Neutral Citation Number: [2024] EWHC 885 (Ch)

Case No: BL-2023-LIV-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
BUSINESS LIST (ChD)

Liverpool Civil and Family Courts,
35 Vernon Street,
Liverpool L2 2BX

Date: 19/04/2024

Before :

HHJ CADWALLADER SITTING AS A JUDGE OF THE HIGH COURT

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Between :

Abdul Rahman Hayel	**Claimant**
- and -	
(1) Abdul Aziz Hayel (a protected party, by Tarek Hayel, his litigation friend)	**Defendants**
(2) Nageeb Hayel	

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Pepin Aslett (instructed by **Quinn Barrow**) for the Claimant
David Green (instructed by **Hill Dickinson LLP**) for the First Defendant
The Second Defendant did not appear and was not represented

Hearing dates: 26, 27, 28, 29 February 2024, 1 March 2024 and 19 April 2024

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JUDGMENT

HHJ Cadwallader:

Introduction

1. This is a partnership action in which the principal issue is whether, as the First Defendant contends in his counterclaim, partnership accounts going back to 2008 should be reopened, or the First Defendant should be given leave to raise certain specific objections to specific figures in them (that is, to surcharge or falsify them), on

the ground of certain errors which he seeks to establish. The question whether the partnership had been dissolved, and if so when, or whether the partnership should be dissolved, was originally in issue, but it is now no longer in dispute, and the evidence plainly supports it, that the partnership was dissolved by agreement on 31 May 2018, and I will declare accordingly. It follows, also, and it is agreed, that an order should be made that the partnership be wound up and that for those purposes all necessary accounts and enquiries should be taken and made.

Background

2. The partnership in question was in a family business called A. A. Hayel & Company and based in Liverpool. It was originally a dairy and property business, and continued as a property business after March 2011, when the dairy business was sold. The property business was, broadly, in the nature of acquiring and letting property, principally residential property in Liverpool. By the time of these proceedings it had acquired over a dozen properties.

3. The family are originally from Yemen (formerly Aden). Back in 1971 the original partners were Hayel Mukbel (or Hayel Mukbel Ghaleb), his brother Ghalib Mukbel, and the 3 male children of Hayel Mukbel, namely Abdul Aziz Hayel (now aged 87), Abdul Rahman Hayel (now in his late 70s), and Nageeb Hayel (2 years younger than Abdul Rahman Hayel). The partnership was governed by a partnership deed dated 21 October 1971 which, however, was not in evidence.

4. It is common ground that Hayel Mukbel had come to the UK in 1948. Abdul Aziz Hayel and Abdul Rahman Hayel joined their father in the UK in 1956. Abdul Aziz Hayel was already a young man. The family spoke to each other in Arabic, and he learned to speak English following his arrival, but he received no education in the

UK, and never learned to read or write English. Abdul Rahman Hayel, being younger, received a secondary education in the UK, and is able to read and write English. Nageeb Hayel was educated in Yemen, and did not move to the UK until 1974 (although he became a partner in 1971).

5. The older generation, Hayel Mukbel and Ghalib Mukbel, retired from the partnership with effect from 1 January 1984 on the terms of a deed dated 30 January 1984, which was before the court, leaving the three brothers as equal partners upon the terms on the 1971 deed as varied.

6. There was no dispute as to the roles of the partners. Abdul Rahman Hayel had sole control of the partnership paperwork, collected the rents, kept the records, held the bank card and controlled the bank accounts, dealt with the partnership accountants and other professionals, and provided all the information required by Kinsella Clarke, the accountants, to prepare the partnership accounts and dealt with any questions. He also had a power of attorney for Abdul Aziz Hayel for many years, and a third party mandate over two of his personal bank accounts. This reflected and no doubt reinforced his superior command of English. He said he also carried out physical work for the partnership, and I think it likely that he did, but that was not his main role.

7. Abdul Aziz Hayel delivered the milk and handled the renovation and maintenance of the partnership properties, carrying out the physical and manual work. He continued to do so until his health prevented it. He had suffered a serious head injury in 2010 which, among other things, left him depressed. His health deteriorated: he had heart surgery and then knee surgery, was diagnosed with vascular Parkinsonism in 2018.

He suffered strokes in early 2021 and was diagnosed with vascular dementia in July 2021.

8. The way in which the partnership accounts were prepared is not in dispute. Once Kinsella Clarke had prepared the annual accounts on the basis of information provided by him, Abdul Rahman Hayel would sign them, and either give them to his brothers to sign, or leave them at the family home for them to sign. His evidence was that, seeing that he had already signed them, his brothers would be happy to countersign without asking for any supporting documentation, and never raised any questions until much later when relations deteriorated. Whether they did in fact countersign all the accounts before 2012 is not wholly clear, but I do not need to resolve the issue because it is accepted that all the accounts material to this dispute were settled accounts, and I am satisfied that whether or not they were countersigned, the parties treated them as such, because the other partners trusted the Claimant. All the accounts from 2012 must have been signed by all three brothers, because I accept the evidence of Mr Kirkham of Kinsella Clarke that from then on their policy had been to require all partners to sign, although he had no personal knowledge of whether they had in any particular case.

9. There were family meetings in 2006 and 2007 at which Abdul Aziz Hayel had called for a dissolution, but none was agreed. The relationship between the brothers broke down between 2015 and 2018. The parties disagreed about the reasons, but since they are immaterial, I need not decide. However in late May 2018 the parties agreed to dissolve the partnership. Whether they did so upon binding agreed terms is an issue between them.

10. The Claimant, Abdul Rahman Hayel, brought these proceedings against his brothers and former partners on 13 January 2023 for an order that the partnership be dissolved, that its affairs be wound up and that all necessary accounts and enquiries be taken and made. As is now agreed, the partnership was dissolved as from 31 May 2018, so that an order for dissolution is not required. However, the Claimant also alleged that a binding dissolution agreement had been reached (the tension between this and the claim for a dissolution by the court need not be explored). By the time of these proceedings the First Defendant, Abdul Aziz Hayel, lacked capacity, and, as a protected party, was represented by one of his sons, Tarek Hayel. Through him, he denied that a binding dissolution agreement had been reached, alleged that the partnership had been dissolved in May 2018 by agreement and contract, claimed an order that the affairs of the partnership be wound up, and an order to reopen, alternatively to surcharge and falsify, the partnership accounts for the periods ended 31 March 2008, 2011, 2016, 2017 and 2018 (at least some of which had been signed off by all the partners) on the basis that they contained serious and significant errors as specified in the Defence and Counterclaim. The Second Defendant, Nageeb Hayel, has chosen to take no part in the proceedings, but to be bound by the result.

Issues

11. The issues for determination at trial are as set out in the closing submissions of the First Defendant. They are formulated slightly differently in those of the Claimant, but nothing turns on the precise formulation.

(1) Should the Court declare that the partnership was dissolved on 31 May 2018? Both parties agree that the Court should make such declaration.

(2) Should the Court order the winding up of the affairs of the partnership? This follows as a consequence, and the parties are agreed that the Court should make such an order.

(3) Should the Court permit settled accounts to be re-opened or surcharged/falsified?

(4) Do the 2008 partnership accounts contain such an error (drawings of £146,959 to the First Defendant and no drawings to the Claimant and Second Defendant) to justify re-opening or surcharging/falsifying that account?

(5) Do the 2011 partnership accounts contain such an error (sale proceeds of the dairy understated by £10,000) to justify re-opening or surcharging/falsifying that account?

(6) Do the 2016 partnership accounts contain such an error (equal drawings of £406,819 for each of the Claimant, First Defendant and Second Defendant) to justify re-opening or surcharging/falsifying that account?

(7) Do the 2018 partnership accounts contain such an error (failure to account for the proceeds of sale of 127A Upper Stanhope Street) to justify re-opening or surcharging/falsifying that account?

(8) Do subsequent partnership accounts in the years after errors have been identified (including 2017 and 2018) contain corresponding errors in the capital accounts to justify re-opening or surcharging/falsifying them?

(9) What is the effect of the documents signed by the parties on 28th May 2018?

(10) What accounts and inquiries should be directed, or other orders made to give effect to the winding up of the affairs of the partnership?

Dissolution

12. It is clear from the evidence on both sides that the partnership was dissolved by agreement and conduct on 31 May 2018, and both active parties agree that the Court should make such declaration. I will therefore do so.

Winding up

13. Whether there was a dissolution agreement or not, it is plain that the affairs of the partnership have not been wound up and it follows from its having been dissolved that an order for it to be wound up should be made as the parties agree. I will therefore make such an order.

The approach to errors in the accounts

14. The defendant's counterclaim as regards errors in the accounts is in the nature of an action for an account. That is an appropriate form of action whenever money allegedly belonging or owing to the firm in respect of a partnership transaction is sought to be recovered from a partner unless an account has already been taken or (exceptionally) taking an account would serve no useful purpose: see *Lindley & Banks, Partnership*, 21st ed., 23 – 119. A partner (in his capacity as a partner) does not have an action at law to recover monies due from his fellow partners otherwise than by means of such an action: see Lord Millet in *Hurst v Bryk* [2002] 1 AC 185, 194, *obiter*. The general rule, at least, is that an account can only be taken between partners following or with a view to a dissolution, as in the present case: *Lindley & Banks, Partnership*, 21st ed., 23 –135ff. The right of a partner to bring an action for an account for these purposes is to be distinguished from his or her right to an account under section 28 Partnership Act 1890, which is directed to the provision of

information. An action for an account is directed to the ascertainment and payment of whatever sum is due to the partner in question: *Lindley & Banks, Partnership*, 21st ed., 16-41ff, 23-118.

15. The allegation that an account has already been agreed between the partners is one of the defences which may be raised to an action for an account. That involves alleging that the partners against whom the defence is raised have received and acquiesced in the account which has been rendered, both as to the principles upon which the account was prepared, and as to the items included in it. See *Lindley & Banks, Partnership*, 21st ed., 23-138ff.

16. The Claimant raises that defence in the present case, on the basis that the accounts sought to be impugned were received by the other partners (as I have accepted) and either positively agreed to by them (as appears from their having signed them) or at least acquiesced in by them (as appears from their having taken no objection to them for many years). The First Defendant accepts that the accounts are indeed settled accounts. That is on the basis that even if 2008 or the 2011 accounts were not signed by the First Defendant, the 2016 and the 2018 accounts were so signed, and a later settled account implicitly settles earlier accounts: see *Blackett-Ord and Haren, Partnership Law,* 6th ed., 14 – 42. I agree that must be so where, as here, the accounts run on from year to year.

17. That acceptance is, however, slightly equivocal: it is said on his behalf that they are settled 'on their face.' I do not accept that the accounts are settled merely 'on their face'. The basis upon which the First Defendant argues for this qualification is that the signature of the First Defendant was a matter of form, but not substance, because he should not be taken to have understood and approved them, signing merely

because he trusted the Claimant, without any independent verification, or any involvement with the record keeping, and without even being able to read the accounts. I accept those features of the case as matters of fact. Nonetheless, it seems to me that by his signature he must be taken to have indicated that he approved the accounts, whether he understood them or not. That makes them settled accounts. The features upon which the First Defendant relies are, however, relevant to the question whether they should be reopened even so.

18. The parties do not disagree on the substantive law: a settled account is binding on the parties who agree it and will not normally be reopened to any degree, absent a specific direction to that effect: see *Lindley & Banks, Partnership*, 21st ed., 23-186. This only applies within the ambit of the matters for the purpose of which the account was agreed, however. Settled annual profit and loss accounts may not be binding on matters which only become relevant upon a dissolution: *Re White* [2001] Ch 393; and see *Blackett-Ord and Haren, Partnership Law,* 6th ed., 14.42. In the present case we are in terms addressing annual accounts rather than dissolution accounts; but since the matters at issue in relation to those accounts are also matters which would affect the preparation of dissolution accounts, it is sensible to approach the matter on the footing that the annual accounts are binding in relation to those matters for present purposes.

19. A direction to reopen a settled account may be obtained nonetheless if fraud, misrepresentation or errors can be proved. The First Defendant in the present case relies only upon errors. The position is stated in *Lindley & Banks, Partnership*, 21st ed., at 23-188ff.

> "Where errors affect the whole of a settled account, a new account will be directed, unless the account has stood unimpeached for many years. Lord Lindley explained:

> "… if no fraud be proved, an account which has been long settled will not be reopened in toto; the utmost which the Court will then do will be to give leave to surcharge and falsify [i.e. permission to challenge specific items in the account]; and there are cases in which, in consequence of lapse of time, the Court will do no more than itself rectify particular items, instead of giving leave to surcharge or falsify generally."

23-189

In any other case, permission to serve notice of objection to specific items in the account will be the only available remedy. An item omitted by mutual mistake will normally be put right. However, the mere fact that items are treated in an improper way, or are improperly omitted, is not in itself sufficient to induce the court to reopen a settled account; if the partners knew about those items and no fraud or undue influence can be proved, it will be inferred that they were dealt with in an agreed manner.

23-190

In order to impeach a settled account, any errors must be positively identified and proved; similarly, where the account is settled on an "errors excepted" basis.

23-191

If permission to serve notice of objections is obtained, errors both of fact and law can be corrected. All parties to the action will normally be given such permission."

20. Although in formal terms the First Defendant sought to 'surcharge and falsify' specific items in the alternative to a claim to reopen the accounts entirely, the impracticality of doing so was recognised in submissions before me, and I did not understand the First Defendant to be seeking with any enthusiasm an order to reopen the accounts. That seems a realistic approach in the present case, given the extent of the exercise involved.

21. As the Claimant points out, and I understood the First Defendant to agree, it follows that the burden is on the First Defendant positively to identify and prove any errors upon which he seeks to rely.

22. Counsel for the Claimant goes further, in suggesting that if there is any doubt on the matter, the case will be determined against the person seeking to surcharge and

falsify. This is on the basis of no lesser authority than the judgment of Jessel MR in *Gething v Keighley* (1878) 9 Ch D 547, 552. However, the whole passage (as far as relevant) reads as follows.

> "…why should I make entries in those books conclusive evidence if the person complaining of them, can by clear evidence at this distance of time shew that there is an error in the books? Where there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him."

I do not understand him, in context, to have intended by that to change the test, or to alter the standard of proof, which remains the balance of probabilities. I therefore reject this submission on behalf of the Claimant.

23. The First Defendant has, in his statements of case and indeed evidence, positively identified the errors upon which he seeks to rely. Nor was there any misunderstanding about them at trial. The question is whether they are proved.

24. The Claimant complains, however, that although the counterclaim is based on alleged errors, the First Defendant has come close to making un-pleaded, or at any rate complex and unparticularised, allegations of serious breach of duty on the part of the Claimant in seeking to establish such errors, but has not actually made any such allegations. On that basis, the court is urged to make no findings that the Claimant has been in breach of his duties, and in any event to proceed with anxious caution.

25. It is right to say that no cause of action other than the right to an account and the existence of errors sufficient to justify at least obtaining permission to surcharge and falsify specific items in the settled accounts has been pleaded. Moreover, it is right to say that the First Defendant seeks such specific findings as the court feels able to make at this stage as to what corrections should be made to the accounts, and in particular seeks corrections to be made on the footing that certain sums have been

applied to the benefit of the Claimant when either they have not been accounted for, or have been accounted for on the footing that the benefit was not exclusively that of the Claimant. Since, on the facts, the Claimant is alleged to have been the person in control both of the money and of the partnership records, and the preparation of the accounts, it is easy to see that claims might have been (but have not been) formulated on the footing of wrongdoing on the part of the Claimant, and that in the process of making findings which might support the making of corrections to the accounts, the court might make findings of wrongdoing, or of facts which implied wrongdoing, on the part of the Claimant. While this may be uncomfortable for the Claimant, I do not see that it creates a problem with the First Defendant's case. In the first place, if the First Defendant can obtain the relief he seeks without having to establish a case of wrongdoing, I see no reason why he should not do so. In the second place, the First Defendant's case is set out in a way which makes it clear exactly to what the Claimant needs to respond. In the third place if, in the process of establishing the existence of an error, one also establishes what needs to be done to correct it and why, there is no point at all in failing to do so right away.

26. The conventional approach to an attempt to reopen accounts or to obtain permission to surcharge and falsify items within accounts is to adopt a 2-stage process. The first stage is to obtain permission to reopen them, or to give notice of the particular items to be challenged, and the second is to retake the accounts, or to correct the particular items. The first stage can often be carried out in a fairly summary way. That did not happen in the present case, when the first stage has been the subject of an extensive trial. In the present case the First Defendant invited me, effectively, to carry out the first stage and, at the same time, as much of the second stage as I found I could. Counsel for the Claimant accepted that this was the basis upon which the matter had

been case managed through to trial, and the evidence had been prepared. I see nothing wrong with it in principle. The 2-stage approach may be a matter of practice, but the practice may be departed from, and the two stages may be collapsed or shortcut where convenient and just, as it is here. A similar approach was adopted, for example, in *Montgomery v. Cameron & Ors* [2007] Scot CS CSOH_63 (23 March 2007), and is referred to in *Lindley & Banks, Partnership*, 21st ed., at 23-122. This does not affect the burden of proof, which I accept remains upon the First Defendant throughout. On that basis, and by agreement, the First Defendant opened the case and called his witnesses first.

27. The Claimant also sought to argue that the First Defendant had adopted an incorrect approach, by bringing a claim that accounts should be reopened without there having been any antecedent judicial findings or admissions as to breaches of duty on the part of the Claimant, so that at the outset of the trial the First Defendant did not in fact know if there were any errors at all. If this is a different submission from those with which I have dealt in the preceding paragraphs, I do not follow it. Distinct errors were alleged and the allegations were supported by evidence, and it was upon that basis that the First Defendant sought to meet the Claimant's case that the accounts in question were settled accounts. The trial was largely concerned with establishing whether there were such errors so that the accounts should be reopened and, if possible, corrected.

28. The Claimant alleged if, as it was averred that such deeds usually do, the 1971 partnership deed contained a provision that annual accounts were treated as being conclusive once they had been signed, the First Defendant would be precluded from seeking to reopen those accounts; but that the Claimant was unable to access that

deed, which was stored in a partnership garage. There was no evidence and I do not accept that partnership deeds usually contain such a provision, although of course they often do. The deed was never produced. Extraordinarily, in the course of cross-examination the Claimant admitted that he had had access to the 1971 deed at all times, but had not disclosed it because he 'did not think it was necessary', despite the allegation pleaded on his behalf (not by counsel who appeared before me) which he had personally verified with a statement of truth. Sensibly, counsel for the Claimant did not pursue this claim.

The evidence

29. Before turning at last to the substantive issues, I should make some general observations about the witnesses. The factual witnesses for the First Defendant were Hayel Hayel, Mrs Munira Hayel Mukbel and Tarek Hayel. He also called a forensic accountant, Mark Fairhurst, as an expert witness. The First Defendant himself, of course, was not able to give evidence on his own account. Hayel Hayel is his eldest son and used to work for the partnership. Tarek Hayel is another son of his, and his litigation friend. Mrs Mukbel, who gave evidence through an interpreter, is the First Defendant's wife. Much of their evidence was concerned with what the First Defendant had or had not known and what he said and thought about it. Inevitably, it was largely hearsay, and the extent to which it was hearsay was identified in detail during the course of cross-examination, since the witness statements had not positively identified it as they should have done, although it was fairly clear on the face of them. I do not consider that the trial was unnecessarily lengthened in consequence.

30. Counsel for the Claimant took the point that there had been a breach of section 2(1) Civil Evidence Act 1995, Practice Direction 32 paragraph 18.2, and Practice Direction 57 AC paragraph 2.3. It seems to me that it is open to me to treat the service of the witness statements, even though they do not formally and specifically identify the hearsay elements, as notice of intention to give hearsay evidence, and I do so. Counsel for the Claimant accepted that any such breach did not in any event render the evidence inadmissible.

31. The evidence of Hayel Hayel is criticised on the basis that he did not focus on the questions asked, and recited at every opportunity that his father had trusted the Claimant. However, the fact that he felt strongly about the matter, and that he himself appeared to think that whenever there was an absence of explanation it must follow that it was because of wrongdoing on the part of the Claimant, did not affect the honesty with which his evidence was given. Nor did his acceptance that his father must have received £106,000 from the sale proceeds of property at Leece Street when his witness statement said that he had received none, or his assertion that the spreadsheet he had prepared for himself had not been shared with Mr Fairhurst, when evidently they had been. Mr Hayel was an honest witness, doing the best he could on the basis of limited information.

32. Some nuance and detail were probably lost from the oral evidence of Mrs Mukbel as the result of having to use an interpreter, but the burden of her evidence was clear enough, and I am satisfied that it was actually her evidence. Although there were discussions with the interpreter in Arabic, they appeared on inquiry to be conducted for the purpose of clarifying the question or the answer. Again, I accept that she is a witness of truth, albeit one proceeding on limited information.

33. Tarek Hayel came across as a confident (perhaps overconfident, and rather combative), indignant and sincere witness, with a closed mind as to the blameworthiness of his uncle's conduct. I found that none of this affected the truthfulness of his evidence of fact.

34. All 3 of these witnesses were generally frank in distinguishing what they knew for themselves and what they knew because they had been told it, once they had understood the question and its importance.

35. It was however in the nature of the First Defendant's case, given the limited information and direct knowledge which these witnesses had, that much would depend upon the outcome of cross-examination of the Claimant. It was submitted on behalf of the Claimant that he was at a disadvantage because the First Defendant gave no evidence and accordingly could not be cross-examined upon it. Whatever force there may be in this (and I am not sure there is much), any such disadvantage is more than outweighed by the advantage to the Claimant in being the partner, and the only partner, who actually dealt with the transactions and the way in which they were recorded, particularly in circumstances in which the First Defendant is unable to give his own evidence and to have the Claimant cross-examined upon it.

36. Mr Fairhurst, the accountant, had to give evidence remotely from a ship in the vicinity of New Zealand but thankfully that caused no problems. He was transparently frank and honest. He could only go so far, because of a lack of primary accounting records. He was careful to keep to his role as an accountant, and maintained a proper detachment from the allegations of his client. I reject the suggestion that he was merely clothing allegations of improper payments in his expert report: he was there to assist the court by demonstrating how the figures worked. I accept his evidence.

37. The witnesses for the Claimant were the Claimant himself, John Roberts, Saleh bin Saleh Shahed and Simon Kirkham.

38. The Claimant did not make a good impression as a witness. Like other members of the family, he was forceful and argumentative. I formed the impression that he found the process of being questioned about his conduct of the partnership affairs on behalf, as he may have seen it, of junior members of the family, to be impertinent and irritating. Of themselves, neither impression affects my assessment of his veracity. Moreover, the events which he was being asked to recall were in many cases a long time ago. However, he was neither a frank nor a sincere witness, and counsel for the First Defendant rightly describes him as evasive and dismissive. That was of a piece with his behaviour in family meetings as described by those other witnesses who were there. It was consistent, too, with his not providing information to his fellow partners when asked at the pre-action stage; and with his approach to disclosure in the proceedings, in which he should have disclosed relevant personal bank statements, credit card statements or TSB loan documents but did not. As his cross-examination proceeded, he increasingly dismissed questions by saying that he did not remember, but for the most part I formed the clear impression that this was simply an excuse for failing to respond to awkward questions to which he could perfectly well have recollected the answer, particularly in relation to some of the larger transactions at issue. In approaching this judgment I have had to be careful not to reverse the burden of proof, and to remind myself that there may have been more than one explanation for his evasions. Nonetheless, my overall impression is that he was a thoroughly unreliable witness, who made concessions in cross-examination only when he had to, or thought that it did not matter, or could not be bothered not to.

39. The witness statement of Saleh bin Saleh Shahed was agreed, and he did not give evidence. I accept that Mr Kirkham and Mr Roberts were generally reliable witnesses, as the First Defendant concedes.

2008 partnership accounts

40. The partnership accounts for the year ended 31 December 2008 show a net profit of £19,873, which was divided equally between the 3 partners. They do not show any disposal of assets, but record the First Defendant as having drawn £146,959 on his capital account, while the other partners made no drawings at all. Given that in every other year the drawings were equal, that calls for explanation. Apart from this entry, there was no evidence that he received such a sum. Although counsel for the Claimant suggests otherwise, I understood the Claimant to accept in oral evidence that the First Defendant had never received such a sum, and that the entry was an error. He was unable to explain it. However, there is a potential explanation. A non-partnership property at 191 Edge Lane, Liverpool, which had been owned by Hayel Mukbel before his death in 2000, was sold on 29 June 2007, and the net proceeds of sale amounting to £149,499.37 were paid into a TSB account in the First Defendant's name on 5 July 2007, from which the bulk was then withdrawn over the next 6 months, as appears from the bank statements. The Claimant agreed that he had dealt with the conveyancing solicitors on the sale; and, with some reluctance, that he had arranged for the proceeds of sale to be paid into that account, as he had a third party mandate over it; and that he distributed the funds to his sisters, his father-in-law, and to assist a third party, although he found himself unable to remember or explain all the details of that distribution. None of it, he agreed, had been paid to either of the Defendants. It is likely that it was these proceeds of sale which were treated as

having been a drawing on the part of the First Defendant because of the timing, the sum involved and the use of a bank account in the name of the First Defendant. They were not such a drawing, because the property was not a partnership property and in any event the First Defendant did not benefit from the proceeds of sale.

41. This is a serious and significant error, both because of its size and because its effect rolled over to every subsequent year of the First Defendant's capital account. I accept that the First Defendant would in fact have been unaware of the entry, and if aware would not have understood it, and that if he had understood it he would not have agreed to it. No basis is apparent upon which the Claimant, who will certainly have understood it, could have thought it appropriate to record it in the accounts, and none was suggested.

42. I reject the Claimant's submission that because the error had stood for over 15 years, and every subsequent year reflected further acquiescence in it, that it should not be corrected. I do so because of the substantial nature and effect of the error, and because of the relative disadvantage of the First Defendant to the Claimant in relation to partnership affairs to which I have referred, because it was the Claimant who arranged for the preparation and signature of the accounts, and because in reality the First Defendant will not have known or understood the existence of the error, or its effect.

43. I accept that the error should be corrected, not by reopening the accounts generally, but by deleting the offending entry and increasing the capital account of the First Defendant accordingly in 2008 and every subsequent year.

2011 partnership accounts

44. The partnership accounts for the period 1 January 2010 to 31 March 2011 show a profit on disposal of goodwill of £110,000, and the disposal of motor vehicles at a loss of £4173. The contract for the sale of the dairy business was an Agreement dated 5 March 2011. It provided for the sale of the goodwill, and contained or recorded the purchaser's additional agreement to retain 2 employees and to purchase four specified vehicles. The purchase price for the goodwill was to be £120,000, payable on completion. The evidence was that the Claimant handled the sale. He was unable to explain why the accounts showed a figure of only £110,000 when it was he who was supplying information to the accountants.

45. Counsel for the Claimant suggested that the explanation for the disparity was because the figure was profit, rather than gross disposal proceeds. That cannot be right, however: the accounts contained no carrying figure for the cost of goodwill before disposal.

46. The First Defendant invites the court to infer that this is an error and, moreover, that the Claimant must have retained £10,000 for himself out of the sale proceeds. I am not satisfied that this is an error: there is no other evidence of the sum which was actually paid or of where it went, and it is a not infrequent occurrence that there are costs of sale, or last-minute changes of price. The sum is not large, the transaction dates from 2011, and I am inclined to accept that the Claimant was genuinely unable to explain this apparent discrepancy at this distance of time. Accordingly, I decline to give leave to surcharge and falsify or to make any alteration to the accounts in relation to this figure.

2016 partnership accounts

47. The partnership accounts for the year ended 31 March 2016 show a profit on disposal of fixed assets of £992,515, and a net partnership profit of £1,036,583 divided equally between the 3 partners. The asset in question was 19-33 Leece Street, Liverpool, which had been sold on 29 May 2015 for £1.25 million. The solicitors (Andrew Jackson & Co) paid the net proceeds of sale, amounting to £1,177,515, into a NatWest Bank instant saver account in the names of the Claimant and the First Defendant on that date. The bank statement shows no prior transactions, and I infer this account was opened for that purpose. The Claimant accepted that he opened the account alone, and was in reality the only person who had access to the account. He said that the purpose was to keep the proceeds of sale separate from other partnership monies. He did not say why. I accept that it was highly unlikely that the First Defendant knew about this account until much later. I accept Mr Kirkham's evidence that this account was first disclosed to the accountants only in October 2019.The Claimant accepted that he dealt with the sale and instructed the solicitors. He explained the difference between the sale price and the net proceeds by reference to legal fees and the cost of exiting an advertising hoarding contract on the building. I accept that.

48. The 2016 accounts correctly show the net partnership profit of £992,515 as being divisible equally. They also record equal drawings of £406,819 by each of the partners. That is consistent with the apparently usual approach and, presumably, with the instructions supplied by the Claimant, since he was the only person supplying instructions.

49. The First Defendant's case is that the £1,180,830.60 in the NatWest account (made up of the net proceeds of sale and interest) were not actually distributed equally, however, but that £701,206.88 was paid to or for the benefit of the Claimant (who,

however, denied having any money from the proceeds of sale of the property), £260,779.01 was paid to or for the benefit of the First Defendant, and £218,844.71 was paid to or for the benefit of the Second Defendant. That position is summarised in Mr Fairhurst's report in the table at paragraph 5.5, which identifies several sets of payments, to which I refer below.

Transfers to partners

50. The First Defendant accepts that £106,023 is to be allocated to him: it is made up of a £30,000 transfer to him, and a life policy repayment to him. The First Defendant accepts that £64,088.70 is attributable to the Second Defendant, representing payments of another life policy.

51. Mr Fairhurst's table suggests that there were transfers to the Claimant amounting to £66,816.25 out of the Leece Street proceeds of sale. That is on the basis of transfers, made directly to him (and necessarily on his instructions) amounting to that sum, which appear from the bank statements. I accept that he received this sum, and indeed it was not in the end disputed.

Payments to HMRC

52. The table then shows payments to HMRC, allocated equally between the partners. This is not in dispute.

Sundry business payments

53. The table then shows sundry business payments totalling £71,119.39 which are also allocated equally between the partners. Again, this is not in dispute.

Other distributions

54. The table then shows a series of other distributions, some of which are not disputed, as follows.

Settlement of 4 Lloyds Bank loans

55. The first item under this heading is the sum of £289,826.95 for settlement of 4 Lloyds Bank loans. The parties agree that of this sum, £127,421.16 should be allocated equally between the 3 partners. The First Defendant claims that the balance of £162,405.79 should fall to the account of the Claimant alone, and that is disputed.

56. The loans included a loan of £140,000 on 21 June 2011 and £120,000 on 2 January 2013. The Claimant accepted that he had arranged those loans. Despite numerous requests he has unfortunately not disclosed documentation or provided release forms in relation to them, which he did do in relation to the other loans. No satisfactory explanation has been provided for this. All he could say about why the loans had been taken out was that they were for properties, and that he had not benefited personally. They do not seem to have been for the acquisition of properties, however, because no properties were acquired by the partnership after November 2003. It is hard to understand why loans should have been necessary for other purposes, given that the partnership had raised £1.42 million from the sale of 2 other properties by then.

57. The First Defendant's case is that the Claimant had the benefit of £144,183.91 from the earlier loan (it is not clear how he is said to have obtained more benefit than the value of the loan) and £18,221.88 from the later loan. The figure of £144,183.91 was made up of the following sums:

(1) £5000 was paid on 1 July 2011 to bank account number ending 165. It was the evidence of Hayel Hayel that the bank account numbered 00065165 was a

personal account of the Claimant and that when he had asked the Claimant about it he had refused to answer. I accept this evidence. I think it more likely than not that he would not have said it was the Claimant's unless he knew. The Claimant's refusal to answer, rather than denying that it was his account, is telling. The Claimant said in evidence that he could not remember. That is implausible especially given that it was an issue in the case which he must have considered and could have checked. He did not provide the relevant bank statements. On balance, I am satisfied that this was a payment, not for the benefit of the partnership, but for the benefit of the Claimant.

(2) A cheque for £15,000 paid on 1 July 2011 said to have been paid into an account held in the name of the Claimant's father-in-law, Hizam Ali Dhafer, who died in 2008. I accept the evidence of Tarek Hayel that the account in question received that sum. I infer from the Claimant's inability or unwillingness to explain, and from the fact that this was an account which he controlled, that he had the benefit of this £15,000. The absence of a cheque stub does not make such an inference impermissible.

(3) A cheque numbered 196 for £86,477.57. This was a cheque for a substantial sum, payment of which was arranged by the Claimant, which he said he could not remember, and which cannot be tied to any partnership transaction. Having seen him give evidence on this point, I consider that he could remember what this cheque was for, and that in fact he was simply declining to explain. In those circumstances, I infer that he must have applied it to his own purposes, and accordingly that it falls to his account. Again, the absence of a cheque stub does not make such an inference impermissible.

(4) A payment of £10,256.34, described as a loan repayment from funds transferred to the NatWest business number 2 account. Although the Claimant was unable to explain the loan or identify the creditor, he was clear that the payment related to partnership business, and there is no evidence to the contrary. The First Defendant has not made out his case on this.

(5) A £10,000 cash withdrawal made on 30 June 2011 and said to be a payment to his father-in-law's account. Although the Claimant was unable to recall or explain this withdrawal, he did not accept that it had been paid to his father-in-law's account, there is no evidence that it was and it appears that the partnership business did use cash. I am not satisfied this was not a proper partnership expense. The First Defendant has not made out his case on this.

(6) A transfer of £5000 to the Claimant's account on 30 June 2011. For the same reasons as given under sub-paragraph (1) above I find that this was not for partnership purposes and must have been for the benefit of the Claimant alone.

(7) 3 cheques drawn to cash for £4000, £5500 and £2950 respectively. There is no material before me upon which I can be satisfied that these were not proper partnership expenditure. The Claimant denies that he took the money. The First Defendant has not made out his case on this.

58. The figure of £18,221.88 was made up of the following sums

(1) A transfer of £10,000 to account number ending 165. This was again a personal account of the Claimant. On the face of things, he had the money. There was no explanation. I conclude that this was not partnership expenditure but for the benefit of the Claimant alone.

(2) Foreign order withdrawals of £3503.12 and £4718.76. The Claimant accepted that these might have been for his personal benefit and I accept that they probably were, since the partnership did not trade abroad.

Unknown cash withdrawals

59. Unknown cash withdrawals from the NatWest instant saver account (the Leece Street proceeds) amount to £227,084.67 as identified by Mr Fairhurst. They are identified in the bank statements as a debit with a sort code, date and time. I accept that they were in branch cash withdrawals, and the Claimant accepted in his evidence that he was the only person with access to and a mandate on the account and that he made withdrawals in branch, and so I accept that he made these withdrawals.

60. Of that £227,084.67, £55,597.67 was a single in-branch cash withdrawal made in the Liverpool University branch of NatWest on 1 June 2015, as appears from the bank statement. I accept the First Defendant's closing submissions on this. It was the first withdrawal after the Leece Street proceeds had been deposited. The Claimant accepted it was to pay credit card debts, as he identified in his own incomplete explanatory schedule. He accepted he had 7 personal credit cards, which he was able to list, but said (implausibly) that he did not use them. The Claimant has not disclosed any credit card statements, and has not explained why not. I infer that this was a deliberate choice. He accepted he had the only partnership bank card, which was a debit card, but said (implausibly) that he did not use that either. He initially appeared to accept that this was a payment of his credit card debts but then said he had "changed his mind" and suggested it was the First Defendant's credit card. This is the first time he had alleged this. I formed the view that he was being evasive. There is no evidence the First Defendant had a credit card or credit card debts. I reject the proposition that these credit card debts were

debts of the First Defendant or, for that matter, of the partnership, and I find that this was a payment of his personal credit card debts with partnership money.

61. The balance of £171,487 consisted of a series of cash withdrawals made in branch (as the Claimant accepted) in substantial round sums over a period of about 4 years. The Claimant denied that they were for him. He seemed to say at one point that they were accounted for in his explanatory schedule, but that did not account for £200,000, as he accepted. Otherwise, he offered no explanation. I consider that if these payments had been made on behalf of the partnership for partnership purposes, he would have been able to account for at least some of them. Having seen him give evidence, I formed the view that he was not in fact unable to remember, and I therefore accept that he made these cash withdrawals for his personal use, and did so in the knowledge that the other partners, and in particular the First Defendant, did not even know about the account.

Unknown bankers' drafts

62. There were bankers' drafts in the sums of £25,000 and £20,000 drawn on the account on 22 and 24 June 2015. They were payments to Osama Saeed and Dirham Saeed, his son-in-law and his wife's cousin. These are payments he confirmed in his explanatory schedule. As with the other items, the burden is on the First Defendant to show that they were not payments for the benefit of the partnership. In his witness statement, the Claimant refers to the repayment of outstanding family loans. The natural inference, which the First Defendant draws, is that these payments represent repayments of family loans. The Claimant relied on 2 letters evidently obtained for the purpose of litigation and dated 14 November 2023. The letter from Dirham Saeed confirms receipt of £20,000 in repayment of a loan, but does not say whether it was a loan to the partnership or to the Claimant. The letter from Osama Saeed confirms receipt of £25,000 from the Claimant

in June 2015, and states "I gave you the sum of £25,000 [a] couple of years before that period and it was to pay some of the dues in your business". Both letters are addressed to the Claimant, and neither refers to the partnership. Neither writer was called to give evidence. In his evidence, the Claimant could not say what these loans were for, but denied that they were his debts, saying that the business was short of cash. When he was asked whether, for example, expenditure on property maintenance would have been in the accounts had it taken place, but it was not, his response was that he did not tell the accountants about all the maintenance expenditure, or at least did not remember if he had told them. I did not believe the Claimant, and it is more likely than not that he made these payments otherwise than for partnership purposes, and that they should be applied to his account.

Transfer to business account number 1

63. There was a transfer to business account number 1 of the partnership in the sum of £76,700. The First Defendant accepts that he cannot show that most of these ought not to be attributed to the partnership. However, £20,464.16 made up of payments of £12,537.66 on 7 March 2016 and £7962.50 on 21 March 2017, both to Hitachi Finance (ref: Mr Hayel), related to the Claimant's own kitchen refurbishment, as he eventually accepted in cross-examination. Accordingly, the sum of £20,464.16 is for his account, as the First Defendant alleged.

Loan transfer: settlement of NatWest loan 85567019

64. This was a sum of £10,093.92, of which £6000 is for the Claimant's account on the First Defendant's case. The purpose of the loan is unknown. The £6000 was transferred out of the partnership accounts to an unknown recipient on 20 May 2009. The Claimant said he did not think it was for his personal benefit. I accept that he did not remember, in this

case, and the First Defendant has not made out his case in relation to this sum.

Transfer of £1700 to business account number 2

65. The transfer of £1700 to business account number 2 is accepted as being a partnership payment, and there is no error here.

Property deposits

66. An aggregate sum of £7680 is identified as property deposits of £2380, £3550 and £1750 paid on the date of dissolution. The Claimant accepted that the sums were to replace tenants' property deposits that should have been held separately, but were not. The First Defendant says that because the Claimant could not explain what had happened to them or why they were having to be replaced out of the proceeds of sale of Leece Street, the proper inference is that he spent the money personally. I do not agree. It is regrettably not uncommon for tenants' deposits to be dealt with in this inappropriate way, but there is no positive evidence that the money was not spent for partnership purposes. The First Defendant has failed to make out his case on this.

Payment to Gazem Khaleq

67. The sum of £10,000 was paid out on 22 June 2015. The question is whether it was a repayment of a personal loan to the Claimant, or a partnership liability. The Claimant's evidence was that it was a partnership liability, and the family knew about it. His evidence is supported by letter from Mr Khaleq dated 14 November 2023 saying that it was a loan made in 2015. He was not called to give evidence. There is no direct evidence from the First Defendant to the contrary. It is suggested that because there is no evidence of the loan being paid into the partnership in 2015, and the Claimant was unable to explain it, the court should infer that it was a personal liability of the Claimant. I do not

agree: it does not follow. There might have been several reasons why it had not shown up in the bank accounts or the partnership accounts, given that there was a good deal of dealing in cash, it might have been included in a larger deposit, and the record keeping was considerably less than perfect. The First Defendant has failed to make out his case on this.

Payment to Ahmed Al-Mawri

68. The sum of £1000 was, as the Claimant accepted, a personal loan by him and not a partnership expense. He said that it had been repaid into the partnership account, but did not identify any such payment, and I do not accept that it was. Accordingly this represents an error to be held to the account of the Claimant.

Correcting the 2016 accounts

69. Although I have not accepted every point made by the First Defendant, the errors in the accounts which I accept exist are very substantial and, although they do not require the accounts to be completely reopened, they ought to be corrected because they arise as a result of instructions given, or not given, by the Claimant, and I accept that the First Defendant would have been unaware of them. The errors affect subsequent years. The 2016 accounts should be recalculated accordingly, and those for subsequent years adjusted accordingly for the same reasons.

70. The First Defendant makes the point that the Claimant's own explanatory schedule refers to payments to numerous individuals totalling £134,752 as to which there is no evidence that they related to partnership liabilities. I accept that. However, as he also points out, there is no evidence to show that they came out of the Leece Street proceeds, or are otherwise reflected in the partnership accounts. Accordingly I make no findings in

respect of them.

2018 partnership accounts

71. The partnership accounts for the year ending 31 May 2018, and apparently signed by the partners on 22 January 2019, were evidently prepared on the footing that the partnership property at 127A Upper Stanhope Street, Liverpool remained a partnership asset, and the disposals which they recorded did not include it. Again, these accounts were prepared on the instructions of the Claimant. The Claimant had arranged for that property to be sold in January 2018, and obtained the First Defendant's signature to the transfer. The transaction completed at £40,000 on 5 April 2018, and plainly the disposal should have been included in the accounts and the net proceeds of sale should have been shown as an asset. He was unable to explain what he had told the accountants about this and why it did not appear. The accounts were prepared in the context of the proposed dissolution.

72. The solicitors paid the proceeds of sale to the Claimant, into the NatWest instant saver account which he controlled. The Claimant gave Mr Roberts the account details. Although the Claimant says that some of this money went into the NatWest business account, and some was taken out in cash, his evidence was wholly unsatisfactory on this topic. There was a faint suggestion that some of the money might have been used in refurbishment, but he was unable to say what and upon what properties, and although the accounts for the year show expenditure on repairs and renewals of £48,811, there is nothing to show that this expenditure was funded by any part of these proceeds of sale. Considering the evidence as a whole, I have concluded that it is more likely than not that the benefit of this entire sum was retained by the Claimant, who should have accounted for it to the partnership but did not.

73. Additional complaints were made about the conduct of the Claimant in relation to this

transaction, but for the purposes of this judgment I do not need to make findings about them.

74. The 2018 accounts therefore contain a serious and significant error which, while not requiring them to be opened in their entirety, requires them to be corrected.

The effect of the documents signed by the parties on 28th May 2018

75. On 28 May 2018 the partners signed two word-processed documents, one headed 'To be stipulated by the Solicitor' and the other headed 'Properties to be redistributed between A A Hayel, A R Hayel, & N Hayel'. They appear on their face to record an agreement or proposed agreement as to the partial winding up of the partnership by distribution in specie and the undertaking of various obligations in respect of refurbishment, insurance, financial contributions, access and the like. The documentation was prepared but not signed, including a deed of dissolution, various transfer forms and leases. The Claimant appeared to rely upon them as regulating the terms upon which the partnership should be wound up. The First Defendant complained that there was no claim for them to be specifically performed but accepted in the end that this was merely a rhetorical point since if they were binding, they were binding.

76. The First Defendant said they were not binding. I agree. The parties did not intend them to be legally binding. They were to form the basis of instructions to the solicitor to prepare documentation which they then might or might not agree and execute. That is certainly how Mr Roberts saw it. He acted for the Claimant and expected the other parties to instruct their own solicitors to give them independent advice. The First Defendant actually did instruct a solicitor for a while. Even the Claimant accepted that the documents were only 'binding for us.' As his Counsel accepts, that likely represents a cultural view as to their nature, but it is perfectly clear from their provisional and

incomplete character that they were at best in the nature of heads of terms and were not intended to give rise to a binding contract. No concluded document was executed.

77. The First Defendant also says that the documents which were signed did not reflect all the terms which were agreed, so that by virtue of Law of Property (Miscellaneous Provisions) Act 1989 they could not give rise to a contract. I am not sure that is right, or that, as counsel for the First Defendant suggests, it is demonstrated by the later preparation of extensive draft leases to divide the family home. That is because I am not satisfied that there were agreements as to those matters, and it is more likely that the draft leases were in part to give effect to what had been agreed, and in part required a separate and further agreement. But in view of my conclusion that no binding contract was intended, I do not need to consider the matter further.

78. Accordingly, the winding up of the partnership is not governed by the proposed terms set out in these or any other documents apart from the partnership agreement itself and the general law.

Conclusion

79. I will therefore grant a declaration that the partnership was dissolved on 31 May 2018 and an order that the affairs of the partnership be wound up. I will also grant an order that the errors in partnership accounts for the years ended 31 March 2008 and 31 March 2011 be corrected, and such corrections be carried forward to subsequent years' accounts, so as to reflect the terms of this judgment. I will direct that any accounts and enquiries necessary for the winding up of the partnership be taken and made and that the parties have permission to apply in that behalf. I will hear counsel, if necessary, as to the precise terms of the order and as to costs, if those matters cannot be agreed, on a date to be fixed. In that event, Counsel should submit their competing draft orders in good time

before the hearing.